IV. COMMISSION ANALYSIS AND CONCLUSION

The Commission has reviewed the evidence and arguments of the parties and finds that the following issues are presented for determination:

1) Whether the Commission has the authority to certify that Verizon is in compliance with Section 13-517 and, in the event that it has such authority, it should so certify.

2) Whether Verizon should be granted a waiver from the requirements of Section 13-517.

3) Whether any waiver granted under Section 13-517 should be limited in scope or duration.

We turn now to a discussion of those issues.

A. Jurisdiction

The Commission concludes that it has jurisdiction to determine whether Verizon's current intrastate advanced telecommunications services offerings meet the requirements of Section 13-517 of the Act and, if so, certify Verizon as in compliance with Section 13-517 of the Act. Contrary to Staff's characterization, Verizon has not requested a declaratory ruling from the Commission, and the Commission's grant of the requested certification would not constitute a declaratory ruling subject to 83 Ill. Admin. Code 200.220. The question is not whether a case and controversy is presented, but rather is simply a question of timing, as Staff readily admits that the Commission would have jurisdiction to make the requested determination through an enforcement proceeding initiated after January 1, 2005. As such, it is the Commission's opinion that there is no legal prohibition to the Commission's resolution of the presented controversy at this time based on the full and complete record adduced in this proceeding.

Moreover, the Commission finds that making such a determination at this time is not only legally appropriate but imperative from a policy perspective. Should Verizon's current intrastate advanced telecommunications services offerings not satisfy the requirements of Section 13-517 of the Act, Verizon would potentially need to engage in significant planning and investment to deploy services that would satisfy the requirements of the Act. Verizon would need to begin such activities now, significantly in advance of January 1, 2005, in order to complete the deployments by January 1, 2005. On the other hand, should Verizon's current intrastate advanced telecommunications services offerings satisfy the requirements of Section 13-517 of the Act, the significant planning and investment that potentially would be necessary for Verizon to deploy another advanced telecommunications service could be avoided, but only if Verizon knows, at this time, that Section 13-517 does not require Verizon to undertake such activity. Thus, the Commission finds that it would be contrary to the public interest to withhold the Commission's determination on the presented controversy until sometime after January 1, 2005.

[FIRST ALTERNATIVE]

B. Certification

It is the Commission's determination that Verizon's current intrastate advanced telecommunications services offerings satisfy the requirements of Section 13-517 of the Act. In making this determination, we reject the argument that Section 13-517 requires the deployment of DSL TS. We also find that Verizon's current intrastate advanced telecommunications services offerings are available to at least 80% of its customers. Accordingly, we certify that Verizon is in compliance with Section 13-517 of the Act.

1. Section 13-517 Does Not Require DSL TS

Our ruling is dictated by the plain language of the statute. Section 13-517 is technology neutral in that it defines the term "advanced telecommunications services" to mean "services capable of supporting, in at least one direction, a speed in excess of 200 kilo-bits per second (kbps) to the network demarcation point at the subscriber's premises." 220 ILCS 5/13-517. We find this language clear and unambiguous. Any service capable of the defined transmissions necessarily satisfies the statutory requirements.

We note that Staff agrees that the statutory language is technology neutral, (*see*, Staff Initial Br., p. 14), but nonetheless takes the position that the statute requires the deployment of a specific service - DSL TS. To support its position, Staff advances arguments of statutory construction. However, when legislative intent can be determined from the plain language of the statute, as is the case with Section 13-517, that intent must be given effect without further resort to other aids of statutory construction. *Bruso v. Alexian Brothers Hosp.*, 178 Ill.2d 445, 452, 687 N.E.2d 1104 (1997). Accordingly, we find that we must reject Staff's arguments as contrary to established principles of statutory construction.

Indeed, it is our opinion that the adoption of Staff's position would result in our adding a requirement that DSL TS be deployed when no such requirement exists in the statute. It is a well established principle of statutory construction that a court must not supply omissions, remedy defects, or add exceptions and limitations to a statute, regardless of the court's opinion regarding the desirability of the results of the statute's operation. *Toys "R" Us v. Andelman*, 215 Ill.App.3d 561, 568, 574 N.E.2d 1328, 1333 (3rd Dist. 1991). Accordingly, even should we believe that the deployment of DSL TS would be the best way to satisfy the statute, it would be improper for us to impose it as a requirement because the General Assembly did not do so. We cannot substitute our intent for that of the legislature.

Staff reliance on legislative history suffers from the same deficiency. Furthermore, as Verizon correctly points out, there are numerous ILECs that provide service in Illinois, and there is no indication in the referenced portions of legislative history which ILEC(s) was the intended subject. (*See*, Verizon Reply Br., p. 8). It would be improper for us to assume that any comments that occurred during legislative discussions were directed toward Verizon in the absence of some clear indication otherwise.

Leaving aside the fact that the statutory language is not ambiguous and, therefore, must be given effect without resort to aids of statutory construction, we also believe that Verizon is correct in its position that Section 13-517 cannot be construed to require the deployment of DSL TS because the States do not have jurisdiction to regulate DSL TS. The courts have interpreted the Federal Communications Act of 1934, *as amended by* The Telecommunications Act of 1996, 47 U.S.C. §§151 *et seq*., to preempt State regulation of interstate communications. *North Carolina Util. Comm'n. v. FCC*, 552 F.2d 1036, 1046 (4th Cir. 1977), *cert. denied*, 429 U.S. 1027 (1976). In addition, we recognize that the courts have held that States are preempted from regulating intrastate components of a communication when the communication also has interstate components, the two are inseparable and the interstate components constitute more than a *de minimus* amount of the traffic. *Id*.; *see also*, *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 375 n.4 (1986). In this case, while DSL TS may have an intrastate component, the FCC has ruled that the intrastate component cannot be separated from the service's interstate component and that the service's interstate component constitutes more than a *de minimus* amount of the communication. *In the Matter of GTE Telephone Operating Cos.*, GTOC Tariff No. 1, GTOC Transmittal No. 1148, 13 FCC Rcd 22466, 22480 (1998), *reh'g denied*, 1999 W.L. 98039 (1999); *see also*, *Southwestern Bell Tel. Co. v. FCC*, 153 F.2d 523, 543 (8th Cir. 1998). Thus, DSL TS is an interstate service that is subject to regulation by the FCC.

We also recognize that, when preempted, States cannot regulate in a way that either (i) restricts action that is permitted by Federal law, or (ii) requires action that is not required by Federal law. *North Carolina Util. Comm'n. v. FCC*, 537 F.2d 787, 793 (4th Cir. 1976), *cert. denied*, 434 U.S. 847 (1977). In this case, the FCC has not required carriers to deploy DSL TS to 80% of their customers by January 1, 2005. Accordingly, the State cannot require carriers to undertake such deployment because doing so would require action that is not required by Federal law. The Commission finds that it has no authority to require the deployment of DSL TS in Illinois because carriers are not required to deploy DSL TS under federal law.

We disagree with Staff's proposition that the Commission is somehow immune from this jurisdictional analysis. Staff seems to imply that the Commission does not need to concern itself with jurisdictional boundaries because, based on Staff's construction Section 13-517, the requirement to deploy DSL TS would come from the Illinois General Assembly rather than the Commission itself. However, the restrictions placed on the Commission by preemption are similarly placed on the Illinois General Assembly. Moreover, it is another well-established principle of statutory construction that statutes must be construed consistently with existing law, and in a manner that imparts constitutionality to the statutory provisions. *Dornfeld v. Julian*, 104 Ill.2d 261 (1984). Should Section 13-517 be construed to require the deployment of DSL TS, the statute would be unconstitutional because it would exceed the limits of State jurisdiction. The Commission will not construe Section 13-517 in such a manner.

Accordingly, we find that the deployment of DSL is not required to satisfy Section 13-517. Rather, Section 13-517 may be satisfied by any service that meets the statutory definition for "advanced telecommunications service." The record evidence establishes that Verizon has several services that satisfy the definition, namely DS-1, FR, ATM and HCD. (*See*, Verizon Ex. 3.0, White Dir., pp. 2-4).

2. Verizon's Current Offerings Satisfy The Deployment Requirements

We find that the substantial weight of the evidence demonstrates that Verizon offers or provides its current advanced telecommunications services to at least 80% of its customers. The record demonstrates that that at least one of Verizon's current services that satisfy the statutory definition of an advanced telecommunications service is available to any customer in Verizon's service territory. (*See*, Verizon Ex. 3.0, White Dir., pp. 2-4). No party disputes that all customers within Verizon's service territory can purchase services capable of supporting, in at least one direction, a speed in excess of 200 kbps.

We do not find Staff's arguments that Verizon's current services offerings are not sufficiently deployed persuasive. Staff takes the position that the terms "offer" and "provide" include elements of price and demand that the Commission must consider when assessing whether any particular service is deployed to 80% of Verizon's customers. However, in determining the meaning of terms, established principles of statutory construction dictate that the plain meaning of the terms must be used. *Dept. of Prof. Reg. v. Manos*, 202 Ill.2d 563, 782 N.E.2d 237 (2002). As Verizon readily points out, the dictionary definitions of the terms "offer" and "provide" simply do not include the factors identified by Staff for consideration. (*See*, Verizon Initial Br., pp. 12-13). We decline to read into the statute additional factors not found within the plain language of the statute itself. Indeed, we find it noteworthy that Staff's interpretation of the terms would also exclude DSL TS, the very service advocated by Staff in this proceeding, from satisfying the statutory requirements. (*See*, Verizon Reply Br., pp. 11-12).

We also decline Staff's assertion that each and every one of Verizon's advanced telecommunications services offerings must be available to 80% of Verizon's customers. Our reading of the statute is that the requirements are satisfied as long as the *combined coverage* of advanced telecommunications services offerings reaches at least 80% of the ILEC's customers. Moreover, this determination is ultimately controlled by Verizon's tariffs, which do not have class-of-customer "user restrictions." (*See*, Verizon Ex. 4.0, Trimble Reb., pp. 10-11). Accordingly, Verizon's current services offerings are available to all customers willing to take pursuant to the terms of Verizon's tariffs. As Verizon correctly pointed out, to the extent that there are any physical limitations in Verizon's network to the provisioning of "port and access," rather than "port only," FR and ATM service, a customer may obtain the desired service simply through a meet-point facility with another carrier. (*See*, *Id.*). Staff's position that Verizon does not currently offer advanced telecommunications services to all customers is simply not correct.

C. Conclusion

We conclude that it is appropriate, as a matter of law and policy, to determine Verizon's satisfaction of Section 13-517 based on Verizon's current advanced telecommunications services offerings. We further conclude that Verizon's current offerings satisfy the requirements of Section 13-517 of the Act, and that the deployment of any additional service, including DSL TS, is not mandated by Section 13-517. Accordingly, we certify that Verizon is in compliance with the statutory requirements of Section 13-517. Having so found, it is unnecessary to reach Verizon's request for a waiver from Section 13-517, and we decline to do so.

V. FINDINGS AND ORDERING PARAGRAPHS

The Commission, having considered the entire record herein and being fully advised in the premises, is of the opinion and finds that:

(1) Verizon North Inc. and Verizon South, Inc., are telecommunications carriers as defined by the Illinois Public Utilities Act;

(2) the Commission has jurisdiction over the parties and the subject matter of this proceeding pursuant to the Illinois Public Utilities Act;

(3) the recitals of fact and conclusions of law set forth in the prefatory portion of this order are hereby adopted as the findings of fact and conclusions of law of the Illinois Commerce Commission.

IT IS THEREFORE ORDERED that the Commission finds it is appropriate, as a matter of law and policy, to determine Verizon's satisfaction of Section 13-517 based on Verizon's current advanced telecommunications services offerings.

IT IS FURTHER ORDERED that the Commission certifies that Verizon's current offerings satisfy the requirements of Section 13-517 of the Act, and that the deployment of any additional service, including DSL TS, is not mandated by Section 13-517.

IT IS FURTHER ORDERED that any materials submitted in this proceeding for which proprietary treatment was requested shall be accorded proprietary treatment.

IT IS FURTHER ORDERED that any petitions, objections or motions made in this proceeding and not otherwise specifically disposed of herein are hereby disposed of in a manner consistent with the conclusions contained herein.

IT IS FURTHER ORDERED that subject to the provisions of Section 10-113 of the Public Utilities Act and 83 Ill. Adm. Code 200.880, this Order is final; it is not subject to the Administrative Review Law.

[SECOND ALTERNATIVE]

B. Waiver

We grant Verizon a full waiver of the requirements of Section 13-517 with respect to the Waiver Areas. The substantial weight of the evidence establishes that the cost of deploying DSL TS in the Waiver Areas would significantly exceed Verizon's reasonably expected revenues by a very substantial amount and, thus, would cause Verizon to experience a massive short-fall in revenues. As such, we find that mandating Verizon's deployment of DSL TS in the Waiver Areas would constitute a requirement that is unduly economically burdensome.

1. Undue Economic Burden

Section 13-517(b) requires the Commission to grant a waiver from the Section's requirements when necessary to avoid imposing a requirement that is unduly economically burdensome. 220 ILCS 5/13-517(b)(expressly providing that the Commission "shall" grant waivers under such circumstances). In this case, the evidence establishes that Verizon's costs to deploy DSL TS in the Waiver Areas would far exceed any recovery Verizon would realistically expect to receive. In large part, our conclusion is driven by a single factor, namely the rural nature of the Waiver Areas.

The evidence establishes that the Waiver Areas are largely rural with low population densities. (*See*, Verizon Ex. 2.0, Trimble Dir., pp. 10-12). In this respect, we find that the Waiver Areas are substantially different than the majority of areas served by Illinois' largest ILEC, Ameritech, which are largely urban and dense. No party disputed the statistical comparisons of line counts and population densities between the Waiver Areas and those areas served by Ameritech that Verizon introduced.

The evidence is also substantial that there would likely be very low demand for DSL TS in the Waiver Areas. We find compelling the recent survey performed by the Office of Economic and Regional Development, Southern Illinois University, which concluded that only 2% of the respondents that did not currently have high-speed access would be willing to pay $50 per month to obtain such access. (*See*, Verizon Ex. 7.0, Trimble Sur., p. 22). The results of this study were not disputed by any party. Verizon's actual penetration rates in other areas in Illinois where Verizon has deployed DSL TS also confirm the validity of the study results. (*Id.*)

We find that the number of lines in a serving area, as well as the density of the population, play a major role in the resulting average cost to service the area. (*See*, Verizon Ex. 2.0, Trimble Dir., p. 12). Verizon presented a detailed but conservative estimate of the cost to deploy DSL TS in the Waiver Areas. (*See*, *Id.*, pp. 14-15). Verizon also introduced a conservative estimate of the amount of revenues that would be needed to recover costs, and the amount of revenues that Verizon could, optimistically, anticipate receiving. (*See*, *Id.*, pp. 14-16). Even using what the evidence establishes is an aggressive, and highly unlikely, penetration rate of 17%, Verizon's cost studies demonstrated that Verizon's anticipated revenues would likely under recover Verizon's costs of deployment by a very substantial amount. (*See*, *Id.*, p. 17).

Additionally, the Commission is cognizant of the rapidly expanding technology impact internet access. The record demonstrates that within five years technology may advance to the point that high speed internet access in Verizon's service territory through copper is a moot point or that cost issues are no longer relevant. Staff witness Liu made this point clear in her testimony. (Staff Ex. 1.0, Liu Dir., pp. 9-10; Tr. at 341). As such, considering the low expected demand, significant revenue shortfalls and possible obsolescence associated with deployment of DSL in the Waiver Areas, it is clear that Staff and AG's positions in this docket constitute a recipe for significant stranded investment. Consequently, we find this to be compelling evidence that requiring Verizon to deploy DSL TS in the Waiver Areas would constitute an undue economic burden.

Finally, we note that Verizon has committed to implementing a bona fide request ("BFR") process should a waiver be granted. Through the BFR process, customers in the Waiver Areas will be able to explore possible ways of provisioning advanced telecommunications services in an economically efficient manner. (See, Verizon Ex. 2.0, Trimble Dir., pp. 23-24). While a BFR process is not a requirement for a waiver under Section 13-517 of the Act and, consequently, is not something that we are approving in this Order, we find Verizon's commitment to implement the BFR process noteworthy. The record demonstrates that the BFR process will accommodate what the market actually desires and ensure that there is no undue economic burden placed on either Verizon or its customers. (See, Id.; see also, Verizon Ex. 1.0, Slagle Dir., p. 4). Verizon's commitment to implement the BFR process demonstrates that Verizon is committed to providing advanced services, DSL TS or otherwise, in the Waiver Areas where deployment is a financially viable option.

2. Staff's Recommendation To Subsidize DSL TS Deployment

Staff agreed that the deployment of DST TS in the Waiver Areas would constitute an undue economic burden for Verizon, (*See*, Staff Ex. 3.2, Freetly Sup. Reb., pp. 1-2), but nonetheless suggested that Verizon still be required to undertake the deployment. It is Staff's position that profits from DSL TS in areas other than the Waiver Areas could be utilized to mitigate Verizon's cost to deploy DSL TS in the Waiver Areas. (*See*, Staff Ex. 4.0, Zolnierek Reb., p. 7; Staff Ex. 3.2, Freetly Sup. Reb., pp. 1-2). Staff's proposal is grounded on massive subsidies of DSL TS. We find that the record does not support Staff's position and that it would not be appropriate as a matter of law or policy to follow Staff's recommended course of action.

We do not find anything in the Act that would require, or even authorize, us to mandate the deployment of a service that would necessitate what, in essence, would be such substantial subsidies. The Act is clear that investment in advanced telecommunications services should be prudent. 220 ILCS 5/13-103. Indeed, Section 13-517 does not even leave open the possibility of subsidizing the deployment of advanced telecommunications services pursuant to its provisions but expressly states that a waiver "shall" be granted when necessary to avoid an undue economic burden. 220 ILCS 5/13-517(b)(1)(B).

We also determine that it would be poor public policy to mandate the deployment of a service that would need such substantial subsidies. The evidence is undisputed that subsidies are economically inefficient, send inaccurate price signals and deter efficient competition. Staff's own testimony supports this conclusion. (*See e.g.*, Staff Ex. 4.0, Zolnierek Reb., pp. 2-5; Tr. at 379). For these very reasons, it has long been this Commission's position that cost-causers should be the cost-payers and subsidies should be eliminated from rates. We find no rationale set forth anywhere in the record that would persuade us to find differently with respect to Staff's suggested intra-service subsidy as opposed to an inter-service subsidy. Indeed, the General Assembly has provided that it is one of the goals of the Act that consumers and investors receive fair treatment to the effect that the cost of supplying services is allocated to those who cause the cost to be incurred. 220 ILCS 5/1-102(d)(iii).

In addition, we note that the General Assembly has set forth a policy of relying on competition to address market needs to the extent possible. 220 ILCS 5/13-103(b). In this case, the record establishes that there are many advanced services options comparable to DSL TS

available in the market, including wireless DSL, satellite internet and fixed wireless. (*See e.g.*, Tr. at 368 (Staff witness Zolnierek acknowledging that alternatives exist in the areas where Verizon seeks a waiver)). Indeed, as noted above, one of the two intervening "customer" parties in this proceeding, namely Mt. Zion, acknowledged that it already has access to cable-modem service, (*See,* Tr. at 55), which is a service the Commission has found is a comparable substitute to DSL TS service. (Annual Report, p. 26). As also noted above, technology is rapidly advancing and it is possible that DSL could become obsolete within five years. Together, all these factors warrant a rejection of Staff's position.

Ultimately, we find that we would be acting in direct conflict with a recommendation that we previously made to the FCC should we rely on subsidies to support the deployment of advanced telecommunications services. On November 5, 2001, we submitted Comments to the FCC on whether to include high speed data transmission or Internet access in the definition of universal service. Should those services be included in the definition of universal service, they would be supported through universal service subsidies. We specifically recommended against doing so because we believed that supporting the deployment of advanced telecommunications services through subsidies would inhibit competition. Instead, we recommended that the FCC rely on the marketplace to promote the deployment of advanced services in the first instance. We continue to believe that the position we advocated to the FCC is the most appropriate one.

3. The AG's Recommendation For A Limited Waiver

We do not agree with the AG's position that Verizon can profitably deploy DSL TS to customers within 18 kf of a central office, (CUB Ex. 1.0, Dunkel Dir., p. 2), and, ultimately, to 80% of its customers. (*Id.*, p. 10). We decline to do so because we find that the analysis that underlies the AG's recommendation contains several errors that cause the analysis to be incorrect.

The largest error is the AG's use of a 17% penetration rate. The record overwhelmingly demonstrates that Verizon utilized the 17% penetration rate to avoid any debate over the appropriate level of demand penetration and demonstrate that even with an extremely optimistic penetration rate, Verizon would still under recover its costs by an excessive amount. (*See*, Verizon Ex. 7.0, Trimble Sur., p. 23). However, as discussed above, the evidence of record supports a significantly smaller penetration rate than 17%. No party contested Verizon's testimony that a 17% penetration rate was aggressive, or the evidence introduced by Verizon to establish an actual, estimated penetration rate. The AG's reliance on a 17% penetration rate as the basis for its analysis causes the analysis to be questionable in its entirety. This is especially true in light of the fact that the record demonstrates that the AG was in possession of more reasonable historical penetration rate data, and the AG ***chose*** to ignore this data. In this respect, the AG's position is not credible and should be rejected. Investments of this magnitude should be based on conservative and realistic data, not best-case scenarios that have a high probability of leading to massive subsidies and stranded investment. The Commission will not embark on such a course.

In addition, the AG's position plainly ignores issues such as the availability of advanced services alternatives and the rapid technological changes occurring with respect to advanced

telecommunications services. As noted above, these are factors that must be included in a credible analysis.

We also find that the record demonstrates that the AG's adjustments to Verizon's analysis are incorrect. (*See*, Verizon Initial Br., pp. 50-53 (detailing the inaccuracies in the AG's adjustments)).

Accordingly, we find that the AG's conclusions are not supported by a valid analysis. Overall, the record evidence establishes that when the errors in the AG's analysis are corrected, the net present value of the AG's proposal is negative by a sizeable amount. As such, the AG's proposal would amount to a requirement that Verizon and its customers subsidize DSL TS – a competitive service that is regulated by the FCC. We do not believe that such a result would be legal or, for the same reasons discussed with regard to Staff's proposal, supported by the plain language of the Act. We will not rely on the AG's analysis to change our conclusion that requiring the deployment of DSL TS in the Waiver Areas would be unduly economically burdensome.

C. Conclusion

The substantial weight of the evidence leads us to conclude that it would constitute an undue economic burden and not be prudent to require Verizon to deploy DSL TS in the Waiver Areas. Accordingly, we grant Verizon a full waiver from the requirements of Section 13-517 with respect to the Waiver Areas.

V. FINDINGS AND ORDERING PARAGRAPHS

The Commission, having considered the entire record herein and being fully advised in the premises, is of the opinion and finds that:

(1) Verizon North Inc. and Verizon South, Inc., are telecommunications carriers as defined by the Illinois Public Utilities Act;

(2) the Commission has jurisdiction over the parties and the subject matter of this proceeding pursuant to the Illinois Public Utilities Act;

(3) the recitals of fact and conclusions of law set forth in the prefatory portion of this order are hereby adopted as the findings of fact and conclusions of law of the Illinois Commerce Commission.

IT IS THEREFORE ORDERED by the Commission that Verizon North, Inc. and Verizon South, Inc. are hereby granted a full waiver of the requirements of 220 ILCS 13-517.

IT IS FURTHER ORDERED that any materials submitted in this proceeding for which proprietary treatment was requested shall be accorded proprietary treatment.

IT IS FURTHER ORDERED that any petitions, objections or motions made in this proceeding and not otherwise specifically disposed of herein are hereby disposed of in a manner consistent with the conclusions contained herein.

IT IS FURTHER ORDERED that subject to the provisions of Section 10-113 of the Public Utilities Act and 83 Ill. Adm. Code 200.880, this Order is final; it is not subject to the Administrative Review Law.